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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 342.

SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

JACK W. HUSSEY.

SUPPLEMENTAL BRIEF.

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The brief supporting the petition for certiorari deals with the question of the liability of one road for the negligent acts of a connecting road, which, undoubtedly, is the question of greatest importance to the profession and public generally involved in this case. But there still remains a question not discussed in the supporting brief, but which has an important bearing upon the final outcome of this

case, namely, whether there is any evidence of negligence on the part of the Southern Company or the Evansville Company. As bearing upon this question, petitioner submits the following propositions:

PROPOSITION I.

There was no negligence on the part of the Southern Railway, because the Southern Railway could not be said to have been negligent in using standard equipment, which had long been in use, which had never before been out of order.

Ozanne v. Ill. Central, 151 Fed. 900, affirmed 157 Fed. 1004;
Adduci v. Rwy., 215 Mass. 336;
Homestead Mine Co. v. Fullerton, 69 Fed. 293,

and the break in the signal device, which was the direct cause of the accident, was due to a latent defect which could not have been discovered by the most careful inspection:

Buckland v. R. R., 181 Mass. 3.

PROPOSITION II.

There was no evidence of negligence on the part of the employes of the Evansville road.

RESTATEMENT OF THE FACTS AND ARGUMENT.

Undoubtedly the primary cause of the accident was a fresh break in the mechanism which connected the signal light with the switch lever.

The Southern track ran from east to west. At the point where the Evansville track joined with the Southern track the connection was made by an ordinary switch. The lever which operated this switch was opposite the switch points and was on the south side of the track. The light stand was on the north side of the Southern's track. It consisted in part of a staff twelve or fifteen feet high, surmounted by four signal lights, two of which, at night, showed green, and two of which showed red. (See Exhibit 2, Trans., p. 138.) This light staff was connected by throw rods with the switch lever on the opposite side of the track. It was so constructed that when the switch was closed the green lights were displayed eastwardly and westwardly along the Southern tracks. When the switch was open the red lights showed eastwardly and westwardly along the Southern tracks. Unless disconnected the lights invariably indicated whether the switch was open or closed.

The connection between the switch lever and the light staff was, as stated, by means of throw rods. The lower end of the light staff fitted in a square hole in a short steel crank (Exhibit 3, Trans., p. 138). This crank was held in place by a set screw. A throw rod was attached to the other end of the crank, and the throw rod was in turn

connected with the switch points and the switch lever on the opposite side of the track. This light stand had been installed and in use for about five years before the accident (Trans., p. 121), and it had never before been out of order (Trans., p. 121). During that time fifteen or twenty trains per day had been operated over the switch (Trans., p. 122). It was inspected once a week by the Southern section foreman, his latest inspection having been on the day preceding the night of the accident (Trans., p. 121). His inspection covered the light, the rod that supported it, the throw rod, the throw-rod connections and the crank at the bottom of the light staff (Trans., p. 121). There was then nothing out of order. The Evansville crew in charge of its coal trains had gone in and out of this switch three times on the night of the accident and the switch and lights had operated properly (Trans., p. 78). Twenty-five minutes before the accident a Southern extra freight train passed westwardly over the switch. The passage of this train furnishes the only suggestion of the cause of the break in the connection with the light stand, which was discovered immediately after the accident.

T. E. Veith, supervisor of bridges and buildings for the Southern, was a passenger on the Southern train that was wrecked. Immediately following the wreck he and other employes of the Southern started an investigation to discover the cause of the wreck. He found the switch opened to the Evansville track. The switch lever was in proper position for the open switch (Trans., pp. 107-108). The

lights on the light stand, however, showed green up and down the Southern track, when they should have shown red. He then proceeded to examine the light stand. He found the throw rod properly connected to the crank which operated the lights, but the crank had dropped and was disconnected from the light staff (Trans., pp. 110-111). This was due to a crack in that part of the crank which had been attached to the light staff. This crack permitted the crank to drop off of the light staff. This crack was "a fresh crack"; it was "absolutely bright" (Trans., p. 111).

There is nothing in the evidence to indicate the cause of the break in this crank unless it be attributed to the passage of the Southern extra freight train some few minutes before. It could not be attributed to the wrecked Southern passenger train because, undoubtedly, the break in the crank and the resulting inoperative condition of the light stand had occurred before the passenger train arrived.

Upon the state of facts thus disclosed, we submit that there is nothing to show negligence on the part of the Southern Railway. The light stand and its connection with the switch lever were standard equipment. This is not controverted. This particular light stand had been in operation for five years. It had never been out of order. It would not have been out of order on this occasion but for the break in the crank that connected with the switch lever. This break was a fresh one. It was so recent that it could not have been discovered by an inspector. It oc-

curred after an inspection made on the very day of the accident.

It will be argued that if a different design in the connection of the crank with the light staff had been employed the falling of the crank from the staff could have been prevented. This retrospective criticism of an appliance that fails is familiar. It is always possible after an accident has happened to suggest some means by which it might have been prevented. In this case it is suggested that bolts might have been used instead of set screws to hold the crank on the light staff. It might also be suggested that if the crank had been welded to the staff it would not have come loose. But are not these suggestions beside the point? The set screw had fulfilled its purpose by holding the crank on the staff for five years. It had never failed. It would not have failed in this case but for the break in the crank. The break was something that neither the manufacturer of the signaling apparatus nor the railroad could anticipate. This break resulted from some latent defect in the crank or from some unexplained blow. If the crank had been made of a different material or of thicker metal it might not have broken, but there is no criticism of it on this score. Presumably the material out of which it was made and its thickness had been considered by those who designed it. Nevertheless, it is indisputable that the break in the crank and not the method of its attachment to the staff was the cause of the occurrence.

In the case of Buckland v. Railroad, 181 Mass. 3, an injury to a passenger occurred under circumstances very similar to those here present. In that case the accident happened because of the improper setting of a switch. The switch was operated by a towerman in a tower. The towerman operated the levers so as to set the switch in the desired position. It developed that a pin in the connecting device had broken, so that when the towerman operated his lever the switch did not turn as it should have turned. The evidence showed that proper inspection had been made, which had failed to disclose the broken pin. In deciding that no evidence of negligence was presented the Supreme Court of Massachusetts said:

> "A carrier of passengers, while bound to use the utmost care consistent with the nature and extent of its business, is not responsible for hidden defects which could not have been discovered by the most careful inspection."

It would have been easy in that case to suggest, as has been done in this case, that a larger pin might not have broken, or that some other method of connecting the tower lever with the switch might have prevented the accident. But this would have been mere speculation. To permit such considerations could only result in making a carrier of passengers insurers of their safety. No such obligation rests upon them. Under the law carriers are only required to exercise a degree of care commensurate with the dangers attending their business.

In the case of Ozanne v. R. R., 151 Fed. 900, it appeared that the plaintiff, a lady, had been injured while in the dressing room of a Pullman car. When the train struck a curve she fell, breaking her hip. It was claimed that the railroad was negligent in that it had no fixtures to hold on by hand and no seat such as is common in the men's toilet room of a Pullman. The evidence showed that the car was a standard Pullman car; that that design of car was quite generally in use; that no similar accident had happened before. In holding that there was no evidence of negligence on the part of the railroad company, the Court quoted from Moore on Carriers as follows:

> "Carriers of passengers, especially in vehicles and conveyances propelled by steam or electricity, where the consequences of an accident from defective machinery are almost certainly fatal to human life, are bound to use every precaution which human skill, care and foresight can provide, and to exercise similar care and foresight in ascertaining and adopting new improvements to secure additional protection. It is their duty to adopt and use such means of safety as science has made known and demonstrated to be useful and effective, not unknown and untested practice, but those which to some extent at least have been used and deemed indispensable to safety. While it has been held that carriers of passengers are bound to keep pace with science and art and modern improvements in supplying safe vehicles, and must adopt the most improved modes of construction and machinery and appliances of safety in known use, it is now more generally held by the courts that it is sufficient that they

> have all approved appliances that are up to the standard of those in general use, and which are necessary for the safety of passengers. But the rule does not impose upon carriers the duty of so providing for the safety of passengers that they shall encounter no possible danger and meet with no casualty in the use of the appliances provided by the carrier, **and negligence cannot be attributed for the use of an appliance which has been employed, under varying conditions, upon countless occasions, and uniformly answered its purpose without injury to anyone.** And they are not bound to adopt and use a new and improved method because safer and better than the methods employed by them, if it is not requisite to the reasonable safety and convenience of passengers, and if the expense is unreasonably excessive."

We submit that this quotation fully states the law and that the Southern Railway, in permitting the installation and use on its line of the switch and signaling device here involved, fulfilled its whole duty to its passengers. This particular instrumentality had been installed for five years. It had never been out of order. It was standard equipment. Similar apparatus was in use on other parts of its line. It had been frequently inspected. The Southern had no reason to believe that it was not in all respects safe and suited to the purposes for which it was installed.

Hence, we respectfully say that there was no negligence in this case on the part of the Southern Railway Company.

We next ask the Court to consider whether there was any negligence on the part of the employes of the Evansville road.

There were only three of its employes charged with any duty with respect to the operation of this switch. These three were the conductor, Hughes, and the brakemen, Carson and Stanley. On the night of the accident this crew, together with the engineer and fireman, had gone in and out of this switch three times in handling coal trains between the mine and Oakland City (Trans., p. 78). Just preceding the accident they were returning from the mine to Oakland City at about 1 o'clock in the night. It was dark. They were provided with lanterns to guide them in their work. The engineer on approaching the Southern track stopped about three car lengths from the switch. The conductor, Hughes, and the two brakemen went to the telephone booth, which was about thirty feet from the switch. Hughes called the dispatcher at Oakland City for running orders (Trans., p. 79). The dispatcher told him he could proceed. Thereupon the conductor said to Brakeman Carson, "All right," which meant they would then go on to Oakland City (Trans., p. 94). Carson, the brakeman, then went to the switch and threw it so as to permit his train to go onto the Southern track. Carson then says that the switch points "fitted up all right" (Trans., p. 95). The conductor then thought of the Southern passenger train and upon looking at his watch saw that they did not have very much time to make Oakland City. He then told Carson to ask the engineer of his train if he (the engineer) thought they could make Oakland City ahead of the passenger train. The engineer said they

could not (Trans., pp. 79-80). Carson testified the engineer said, "Well, Harry, we better not try it.". His testimony of what then occurred is as follows:

"I turned around, with nothing on my mind but lining that switch up; first thing I noticed was a green switch light; well, I would have knowed there was something wrong if I hadn't left the conductor out ahead and brakeman beyond, and I just figured one of them had lined it back again, see.

Q. You looked up and saw the light?

A. Yes, sir.

Q. And did the light show——

A. Green lights——

Q. You then thought that some of the others had thrown it to line it for the main line; is that right?

A. Never thought nothing else. If I hadn't left two men there I would have known something was wrong, for the light would have shown lined red for the siding.

Q. Then as soon as you threw the switch to let your train out——

A. It would have went red.

Q. Should have gone red for the main line; is that right?

A. Absolutely.

Q. Then when you went and saw the engineer and he said you wouldn't——

A. Couldn't make it.

Q. Couldn't make it, you say you started then to throw the switch?

A. Turned around, not thinking nothing else, because, you know, I knew it wouldn't be so very long before this passenger train would be along there; as I

turned around and seen the green switch, never thought practically anything about it, just thinking one or the other of them had lined it back; walked up there and sat down, and never a one of us said a thing about the switch, and there we was.

Q. You sat there until the train got there?

A. Yes.

Q. Where were you sitting?

A. I was on the east side of the telephone box, I imagine, about thirty feet of the switch" (Trans., pp. 95-96).

On cross-examination he testified:

"Q. And you say that you did not have to go back and again look at the points, when you knew the Southern was coming through, because you thought somebody else had done so?

A. Well, you see, here is what got me—the switch should have showed red.

Q. Yes.

A. But I left the conductor and the flagman there by the telephone box, the conductor was in the telephone box when I left to go in, and the dispatcher changes their line lots of times, you know, and I just figured that the conductor or dispatcher, one, says, 'Well, don't try to make it—just stay here,' and one had stepped over and lined it back to be green, but if there had been nobody up there I would have known something was wrong, because it would have shown red.

Q. In other words, you were misled?

A. By the switch.

Q. By the switch light, weren't you?

A. The switch light is what fooled me, and by leaving them out there I thought one of them throwed it" (Trans., pp. 98-99).

It was the duty of the conductor, as well as the brakeman, to throw the switch (Trans., p. 79).

This testimony clearly explains how Brakeman Carson, who had opened the switch to let his train onto the Southern track, was led to believe that the switch had been closed and was in proper position to let the Southern passenger train pass. He was, of course, ignorant of the fact that the connection between the light stand and the switch levers had broken. It had never been out of order before. He had no reason to doubt the significance of the green lights being displayed up and down the Southern track. He knew that the light and the switch were so connected that (in the absence of their being out of order) when the light showed red the switch was open, and that when it showed green it showed the switch was closed. This was invariable. If the mechanism was in proper order it could not be otherwise. He could depend upon the lights with as much certainty as could the engineer of the Southern passenger train, whose actions were guided solely by such lights. In all of the intricate operations of trains in and out of complicated terminals and over the great railway systems of the country the operatives are required, per necessity, to depend absolutely upon similar signals, which in the nighttime are given by green, red or other colored lights. Carson, the only one of this crew whose actions

can be questioned, knew when he turned from talking with his engineer, three car lengths away, that the conductor and the other brakeman were near the switch. He knew that the conductor and other brakeman had the power and the duty of operating the switch. He knew that the conductor was in communication with the dispatcher at Oakland City, and he had a right to believe that if the conductor (who was his superior) changed his mind about proceeding to Oakland City he could either throw the switch himself or direct the other brakeman to throw it. In this situation, when he saw that the lights were so set as to indicate that the switch had been thrown, he had reasonable grounds, we submit, for believing that it had been thrown by either the conductor or the other brakeman, and that in so concluding he was not guilty of negligence. After having observed the position of this light he rejoined the conductor and other brakeman at the telephone booth, some thirty feet from the switch, and waited for the Southern passenger train to pass. All three of them observed the green light, and to all three of them the position of the light indicated to them to a moral certainty that the switch was properly set for the passage of the Southern train. To hold that in these circumstances any or all of these men were negligent is to require of them a degree of caution entirely beyond the reasonable.

The solution of the question here presented cannot, of course, depend upon any binding decisions of the courts. The facts in each case vary. It must be determined by

reason, experience and good judgment. But it is a practical matter which ought not to be disposed of by applying impracticable standards of conduct. But as an illustration of a sensible appreciation of a practical matter, as distinguished from a hypercritical consideration of it, we refer to the case of Gray v. B. & O., 24 Fed. (2d) 672. The opinion was delivered by the Circuit Court of Appeals for the Seventh Circuit. The Court had under consideration a case in which a switch light had been put out, the switch light broken and the switch thrown by a negro, who was convicted and sent to the penitentiary for a criminal act in so doing. The train was derailed and a passenger hurt. The railroad was sued and in the suit it was charged that the engineer of the train was negligent in not having observed that the switch light was out and that other railroad employes were negligent in not having examined the switch after having seen the negro at the switch with a crowbar and other instruments. The testimony revealed that the engineer, who had operated over this line many times and was familiar with the position of the various lights, did not notice that the particular light was out. The Circuit Court of Appeals very sensibly, as we think, declared that it was expecting too much of an engineer, under the circumstances there disclosed, to remember this particular light and to gauge his position as his train was proceeding and to observe that it was not burning. A more exacting standard could, of course, have been applied in that case. It could have been said that the engineer

should have remembered the light and that in the darkness should have known when he approached it and noticed its absence; just as here it is claimed that Carson, after having seen the green light displayed along the Southern track, should, nevertheless, have taken his lantern and in the darkness should have gone to the switch and examined the points to see that their position corresponded with the position of the signals. This, we say, is imposing a too-exacting standard of conduct upon him. He was acting and thinking as practical railroad men act and think, and as he had a right to think under the circumstances. He was not guilty of negligence, and if he was not guilty of negligence there was no negligence whatever shown in this case.

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